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IN THE

Supreme Court of the United States

October Term, 1967

No. 751

JOHN P. KOHLER and ROBERT C. KOHLER,
Petitioners,

v.

STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

JOHN P. KOHLER and ROBERT C. KOHLER, the above named petitioners, pray that a Writ of Certiorari issue to review the judgment of the Superior Court of King County, No. 43297, entered on January 4, 1966, and the opinion of the Supreme Court of the State of Washington affirming the said judgment, which opinion was rendered by Department Two of the Supreme Court of the State of Washington on March 2, 1967.

A.

OPINION OF THE SUPREME COURT OF THE STATE OF WASHINGTON

The opinion of the Supreme Court of the State of Washington is set forth in Appendix C and reported in 70 W.D.2d 577, 424 P.2d 656.

B.

STATEMENT OF GROUNDS

The Superior and Supreme Courts of the State of Washington have decided a Federal question in a way probably not in accord with the applicable decisions of this Court.

(i) The judgment of the Superior Court of the State of Washington was rendered January 4, 1966. The opinion of the Supreme Court of the State of Washington was rendered on March 2, 1967, and became final on May 22, 1967.

(ii) The Supreme Court of the State of Washington denied the Petition for rehearing on May 22, 1967. On August 28, 1967, Associate Justice of the above entitled Court, William O. Douglas, granted an extension of time for filing a Petition for Writ of Certiorari in the above entitled cause to October 20, 1967.

(iii) The jurisdiction of this Court to review this case on Petition for Writ of Certiorari rests upon Title 28, U.S. Code, Paragraph 1257 (3).

C.

QUESTIONS PRESENTED FOR REVIEW

1. Did the officers have probable cause to arrest the petitioners?

2. Did the officers have the right to search the petitioners' vehicle?

3. Were the exculpatory statements obtained during the process of the arrest admissible?

D.

CONSTITUTIONAL PROVISIONS

The Constitutional Provisions applicable in this cause are the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States, set out in Appendix D.

E.

STATEMENT OF THE CASE

The petitioners, John D. Kohler and his brother, Robert C. Kohler, were charged by information with the crime of robbery, in the Superior Court of King County, Washington.

The case came on for trial on December 6, 1965, and prior to trial, on December 3, 1965, the then attorneys for the petitioners below, in a timely manner, served and filed a Motion to Suppress the Evidence enumerated in the Motion on the ground that the same was illegally seized without a warrant, and as the result of a search which was not the incident of a lawful arrest. The material portion of the Motion to Suppress follows:

> "Comes now the defendants, and each of them, and by and through their attorneys, Opendack and Alfieri, and hereby move the court that rolls of nickels, suit jackets, a twenty-two rifle, and all other items, actions or statements, be suppressed as evidence in this and any criminal proceeding on the grounds and for the reasons that the defendants' rights, under the Fourth and Fifth Amendments to the Constitution of the United States, as it applies to the states through the Fourteenth Amendment, and under Article I, Section 7, and Article I, Section 9, of our State Constitution, were violated by the search of defendants' car and the seizure of the above-mentioned articles by officers of the City of Seattle Police Department; that, likewise,
>
> "The defendants through their counsel, further moved to suppress said items, in that they were illegally seized without warrant, and said search was not incident to a lawful arrest, nor was there probable cause for same, and therefore a violation of the test of reasonableness under the Fourteenth Amendment as it applies to the Fourth, as laid down by the United States Supreme Court."

When the case was called for trial December 6, 1965, and before the jury was impaneled, and sworn, and likewise, in the absence of the jury, testimony was adduced on the Motion to Suppress, in conjunction with a pre-trial hearing to determine whether or not certain purported admissions by one of the defendants were made voluntarily. At the pre-trial hearing witnesses testified on behalf of the State and no witnesses were called by the defendants.

The State called as a witness, Arthur C. Beane, owner of the "Club 200 Tavern," and Larry E. King, a passenger on a City bus, who rode past the tavern at the time of the alleged robbery.

The testimony of the foregoing witnesses had no bearing on the legality of the arrest and search in this case. Although introduced by the State as witnesses in the pre-trial hearing on the Motion to Suppress, and to determine the admissibility of so-called "confessions or admissions," the evidence of the witnesses Beane and King, served only the purpose of showing the sequence of events, and information which resulted in the police broadcast over the radio. There was no evidence whatsoever that the arresting officer nor his partner had any contact with these witnesses. *The arresting officers acted purely and simply in response to information relayed over the police radio.*

The only witness called by the State, whose testimony could be considered as having any bearing on the question of legality or illegality of the arrest and subsequent search was Seattle Police Officer Bruce M. Johnson, one of the arresting officers.

On direct examination, Officer Bruce M. Johnson, testified that he had been a Seattle Police Officer for six years, and that this case first came to his notice on October 4th slightly prior to Midnight when he was on routine car patrol in the North end of Seattle. He heard the Seattle Police radio broadcast, a Seattle stickup bulletin, of an armed robbery of a tavern in the *Ballard* district. At that time a description was given over the radio of two white male suspects and a *dark green* or *blue* and *white* station wagon, approximately 1953 model, as the suspect car. As a result of this broadcast, the officer with his partner, Officer John Fisher of the Seattle police (who did not appear nor testify at the hearing), continued their patrol and searched for suspects because the robbery took place immediately adjacent to the area they were patrolling.

The police radio broadcast had stated that the suspects were two white males, number one, a white male, 20 to 25 years, 5'8" approximately 150 lbs., medium build, wearing light blue Levi pants and *a white or pale beige zippered nylon jacket.* The second man was described taller, approximately 5'11", 140 lbs. slender build, wearing light Levi pants also and a *darker tan zippered jacket, nylon jacket.* (Note: No age given at any time for second man). These men were alleged to have left the scene of the robbery in a two-tone dark body with a lighter top '53 Ford station wagon.

It is significant to observe that on cross-examination Officer Johnson testified that the description which he received over the police radio was that one suspect was described as a white male 20 to 25 years of age, approximately 5'8" to 5'10", 150 lbs., medium build, wearing *light Levi*

trousers and a *light beige or tan-zippered nylon jacket,* and the other man, as 5'10" to 6', slender build, about 140 lbs., a white male wearing light trousers and a *light nylon-zippered jacket.* Further, that the car described was a 1953, '54 or '55 Ford station wagon, at one time described as being a *light black,* and later described as *light over dark, light color over a darker color,* two-tone Ford station wagon. He likewise asserted that it would be correct to say that the car was described as a '52 to 1955 Ford station wagon, *dark in color* but *light trim.* No further physical description of the men was given, except that they were both masked in the tavern and that the police broadcast said the tall man was armed with a rifle, after originally having stated they had a shot gun which was later adjusted to be a rifle. (Note: Automobiles of 1952 to 1955 vintage were almost uniformly two toned. The unusual car was single toned.)

With reference to the arrest, Officer Johnson testified as follows:

> "Approximately 12:30 A.M. I had stopped the prowler car at the stop sign at 87th and 15th Northwest. At this time I observed a 1953 Ford station wagon, dark green with a white upper portion of it southbound on 15th. I turned directly behind this car and went south on 15th behind it, and observed two young men in the car. They both, as far as age (Note: Age of only one was broadcast), and from what I could see, their general physical build did match the description as had been given of the robbery suspects. While we were following them south on 15th and observing them, the passenger turned somewhat and appeared to notice the police car, and again it just appeared to me that he was calling the attention of the driver that there was a police car behind them, and both the young men then immediately obviously became nervous and sat look-

ing very straight ahead, and nothing to the left and nothing to the right, just became very alarmed at seeing us. We followed them on south on 15th and made a right turn at the corner of 85th and followed then about a block and a half and pulled them over and stopped them."

When the police officers stopped the petitioner's car, Officer Fisher dismounted and walked up to the passenger side of the petitioner's car. He spoke to the passenger, asking him to dismount. The man on the passenger side was petitioner Robert Kohler who was the huskier built but shorter in height. Officer Johnson walked to the rear of the stopped car. The driver, petitioner John Kohler, turned and looked toward him from the driver's seat as the officer motioned for Kohler to also dismount from the passenger side of his vehicle, which he did. Officer Johnson moved around to the side of the car and stood with the two petitioners. Both wanted to know what was going on. The officer stood with them after the petitioners were stopped and removed from the car. He looked into the interior of the car as they stood and talked. On the seat immediately behind the front seat, were two nylon jackets, matching the description as having been broadcast by the police radio, according to the officer. As they stood, the passenger door of the car was open. Both officers and the petitioners were standing more or less at an angle to the door. The petitioners stood against their car, facing the officers who stood approximately three or four feet away from them and to one side facing them. Officer Johnson stated that he and his partner looked into the front, and his partner called to his attention (by shining his light) that there were several rolls of coin on the floorboards of the front seat of the car.

He then recalled that the broadcast on the radio had stated that a quantity of rolled coins were taken from the tavern, together with some currency.

It is significant that Officer Johnson stated on direct examination in answer to the question. "What did you do *after* you saw the jackets and nickels in the car?", stated: "*At that time my partner and I indicated to each other we were in agreement as to the fact that they were the suspects,* and *at this time I advised both the suspects they were under arrest and to turn and face their car and put their hands on the roof of their car.* They did so. I think it was John who wanted to know what this was all about, what for, and I told him he was again under arrest for suspicion of robbery. At this time I searched their persons, handcuffed them and placed them in the police car."

At the time they were stopped, and while the police were following the car, the petitioners did not wear any jackets. The petitioner Robert Kohler, who was the passenger, was wearing a white T shirt. Neither one had visible clothing that the officers matched with the description received over the radio, and Officer Johnson testified that the clothing was not a fact that made the officer suspicious at that time.

The arresting officer stated emphatically that if the petitioners had not pulled over, it was his intention to give chase and stop them, and that until they saw the jackets, *the stopping of the car was on mere suspicion* more than anything else. He stated further that it was *after* seeing the jackets and finding the rolled coins that he was convinced they had the right people, and *until*

that time he and his partner, were merely supicious in stopping the car.

The police did not use a siren but when the red dome-light went on, the petitioners immediately pulled over to the curb and made no effort to get away, nor did the officers feel that they were driving at any time to get away. The police could not tell the height of the men as they sat in the car before they were stopped, other than their general build, and further, that when the passenger who turned out to be Robert Kohler leaned forward, apparently moving something on the floor of the car, just before being stopped, the officers had no idea what he was doing.

Immediately after being stopped, nor at the time of the officer's announcement to the petitioners after the search, that they were under arrest, the defendants were not advised of their rights. However, at the police station they were advised partially of their rights by Officer Johnson, and later by Detective E. T. Mullen. Officer Johnson stated that he had advised the defendant below, John Kohler, of his right to remain silent and to make no statement, and that he could contact an attorney. This was the extent of his warning. At that time, John Kohler said he was aware of his rights and had nothing to say. Approximately, 1:10 in the morning, while John Kohler was seated in one of the workrooms, and the officers were working on their reports, he asked to go to the men's room and while there, stated to Officer Johnson "I would like to make a deal to get my kid brother off." The officer stated that he had not said anything to him other than to take him to the restroom, and told him he couldn't make any deal. At that time John Kohler did ask for an attorney

and an attempt was made unsuccessfully to contact one, thereafter.

Officer E. T. Mullen, of the Homicide and Robbery Detail, Seattle Police Department, later testified that around 1:30 at the Wallingford Precinct on the early morning of October 5th, he talked to petitioner John Kohler, identified himself, advised him that he did not have to say anything, that he had a right to see an attorney before saying anything, and that anything he did say could be used in court of law. *This was the extent of the warnings given by both officers.* This witness testified that he told the petitioner, John Kohler, that he and his brother had been arrested as suspects in a robbery of a tavern. Kohler then stated "Were the men masked?" Officer Mullen asked "Why do you want to know?" John Kohler then stated "Because if their heads were covered they couldn't be identified." Detective Mullen stated that he told Kohler at this time that he had not mentioned anything previously to him about any mask of any sort, and at that time Kohler demanded the use of a phone to call an attorney which was furnished.

The petitioner, Robert Kohler, refused to make any statement whatsoever.

The trial court ruled that the arrests were legal, the search accompanied a legal arrest, and that therefore the search of the automobile and picking up of the things that were in sight at the time, or were found on the persons of the individuals, were properly made without a warrant, and search and seizure thereof and the procurement of these articles mentioned in the Motion to Suppress were properly and legally procured.

The court, likewise, could not decide whether the statements of the petitioner, John Kohler, were confessions, and treated them as *admissions* with reservations. He held that the statements made by the petitioner, John Kohler, would be admitted in evidence as voluntary statements made without any compulsion or persuasion. The trial court denied both petitioner's Motion to Suppress the evidence, as set forth in the motion, both physical evidence as covered in connection with the search, and the statements made by the petitioner, John Kohler.

After the pre-trial hearing and the court's ruling thereon, the jury was called and the case proceeded to trial. Neither petitioner took the stand in the trial and both rested after the State's case.

Both petitioners were found guilty by the jury on December 7, 1965. A special verdict was returned finding that the petitioner, John Kohler, was armed at the time of commission of the offence.

Both petitioners moved for the arrest of judgment, or, in the alternative, for a new trial on the ground of error of law occurring at the trial, and excepted to by the petitioners, *including* the Motion to Suppress evidence, denied by the trial court prior to presentation of the State's case in chief.

After arguments on January 4, 1966, the court denied the petitioners' Motion for Arrest of Judgment, or in the alternative for a new trial, and an order was entered thereon January 5th. Findings and Conclusions on Admissibility of Confession were filed on January 4, together with an Order denying the Motion to Suppress. On the same date judgment and sentence was entered

against both defendants upon the verdict of the jury and Notice of Appeal therefrom on behalf of both defendants filed.

The Supreme Court of the State of Washington affirmed the judgment and sentence of the Superior Court, and also, denied the petitioners' petition for rehearing.

F.

FEDERAL QUESTION AS PRESENTED AND DECIDED BY STATE COURTS

The petitioners contested the arrest and the admission of any evidence seized during said arrest and the admission of the exculpatory statements obtained thereafter by filing a motion prior to the jury trial commencing. Testimony was taken in absence of the jury prior to the trial, at which time the illegality of the arrest and the admission of evidence were raised and decided adversely by the trial court against the petitioners. Such proceedings appears at pages 1 through 49 of the record of the trial court. These errors were again presented to the Washington State Supreme Court by Assignments of Errors and they were considered by the Supreme Court at page 582 of the enclosed opinion in the Appendix.

H.

ARGUMENT

The Arrest and Search Were Illegal

Although Officer Johnson testified that he told both petitioners they were under arrest *after* he had observed the jackets and found rolls of nickels on the floorboard of their car, the actual arrest technically took place when the appellant's car was stopped by the police officers and

they were no longer free to go or come as they chose, being under the compulsion of the officers' authority which they respected in stopping and dismounting from their car.

That it was the intention of the officers to restrict the movements of the petitioners at that time and arrest them is borne out by the fact that Officer Johnson, in response to the direct question "If the defendants hadn't pulled over, was it your intention to give chase and stop them?", the officer answered emphatically and without equivocation, "Certainly."

That this was an arrest of petitioners, there can be no doubt. The petitioners acted immediately after the officers made known their official capacity and they submitted to the commands of the officers.

An arrest is defined in 4, American Jurisprudence, at Page 5, as follows:

> "An arrest is the taking, seizing, or detaining of the person of another, either by touching or putting hands on him, or by any act which indicates an intention to take him into custody and subjects the person arrested to the actual control and will of the person making the arrest. The act relied upon as constituting an arrest must have been performed with the intent to effect an arrest and must have been so understood by the party arrested. Also, the person making the arrest must be acting under some real or pretended legal authority for taking the person into custody. It is not necessary, however, that there be an application of actual force, or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest; it is sufficient if the person arrested understands that he is in the power of the one arresting and submits in consequence."

The question which arises after such an arrest is whether probable cause and reasonable grounds for arrest existed at the time of stoppage of the car and prior to any search thereof.

A case very much in point in this regard was the case of *U.S. v. Boston* (C.A.N.Y.), 330 F.2d 937, 938, in which the court held that "an arrest" was commenced upon initial interruption of the defendants' liberty, and the mere fact that search and seizure may have preceded formal announcement of arrest by a few moments, did not mean that the arrest rested upon fruits of seizure *where probable cause and reasonable grounds for arrest existed prior to the search.*

In the case at bar there can be no question that the arrest rested in this case on mere suspicion, and that the officers themselves did not have, nor believe that they had, probable cause or reasonable grounds for arrest until the fruits of the search resulted in discovery of the jackets and rolled nickels, at which time Officer Johnson announced that the petitioners were under arrest for the first time.

In the case at bar we must reach the conclusion that Officer Johnson and his partner arrested the petitioners when they turned on their red lights and two spotlights and pulled them over to the curb under the circumstances in this case.

We can arrive at no other conclusion than that this was the time of the arrest. At that time the officers admittedly did not have sufficient facts to constitute probable cause and a reasonable belief beyond the mere suspicion which became the pretext for effecting the arrest under a hope

that as a result of the fruits of such arrest, the officers could determine whether or not the petitioners were the suspects sought.

An arrest may not be used as a pretext to search for evidence, *U.S. v. Lefkowitz*, 52 Sup. Ct. 420, 285 U.S. 452, 76 Law Ed. 877; *Taglavore v. U.S.*, 292 F.2d 262 (C.A. 9th, 1961).

In the case of *Henry v. U. S.*, 80 Sup. Ct. Rep. 168, in reversing a conviction for unlawful possession of radios from interstate shipment, this court held that Federal officers investigating the theft from interstate shipment of whiskey and following the defendant driving in an automobile through a residential area when they observed the defendant loading cartons into an automobile, accomplished an arrest *when they stopped the defendant's vehicle*, and they did not have probable cause at that time for arrest without a warrant, and hence that the search incidental to the arrest was unlawful. The court speaking through Justice Douglas said, among other things, on Page 171:

> "The Prosecution conceded below and adheres to the concession here, that the arrest took place when the Federal agent stopped the car. That is our view on the facts of this particular case. When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete. It is, therefore, necessary to determine whether at or before that time they had reasonable cause to believe that a crime had been committed. The fact that afterwards contraband was discovered is not enough. An arrest is not justified by what the subsequent search discloses, as *Johnson v. U.S. supra*, holds. See *Johnson v. U.S.* 68 Sup. Ct., 367, 368, 369, 33 U.S. 10, 13, 15, 92, Law Ed. 436."

At another point in the decision on Page 170, Justice Douglas says:

> "It was against this background that two scholars recently wrote, 'Arrest on mere suspicion collides violently with the basic human right of liberty.'"

See *Hoggan & Snee,* and McNabb-Mallory rule: *Its Rise, Rationale and Rescue,* 47 Georgia Law Journal 1, 22.

The *Henry* case, likewise, held that under the Fourth Amendment, common rumor or report, suspicion, or even "strong reason to suspect" is not adequate to support a warrant for arrest. It was likewise held that evidence required to establish guilt is not necessary to authorize an arrest without a warrant, but on the other hand, good faith on the part of the arresting officers is not enough and, further, held that "probable cause" justifying an arrest without a warrant exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offence has been committed.

In the case of *Beck v. Ohio,* 85 Sup. Ct. 223, 379 U.S. 89, 13 L.Ed.2d 142, 33 Law Week 4015, the Supreme Court of the United States reversed the Ohio Supreme Court in a case where the petitioner was driving his automobile on a Cleveland street when police officers ordered him to pull over to the curb. Although they had no warrant they arrested him and searched the vehicle but found nothing of interest. When they searched him in the police station, they found an envelope containing a number of clearing house slips, 'beneath the sock of his leg.' The petitioner was subsequently convicted of possession of clearing house slips, a felony. At his trial, he tried unsuccessfully to suppress the slips found on his person on the

ground that they had been obtained by an unreasonable search and seizure. The conviction was upheld by the Ohio Supreme Court.

Mr. Justice Stewart delivered the opinion of the United States Supreme Court reversing. The court said that the search and seizure here was proper only if they were incident to a lawful arrest, and the arrest here was lawful *only if, at the moment* of the arrest police "had probable cause to make it—whether at that moment the facts and circumstances within their knowledge, and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offence."

In deciding that there was no probable cause in that case, the court said that the records showed only that one of the officers "had a police picture" of petitioner and knew that he had "a record in connection with clearing house and scheme of chance." Beyond that, the officer testified only that he had "information," and he had "heard reports," that "someone specifically did relate that information," and that he "knew who that person was." None of this, the United States Supreme Court said, gave the police any reasonable ground to believe that petitioner had acted or was acting unlawfully. The above case was decided in 1964.

The arrest of the petitioners in the case at bar cannot be justified on any ground.

The record shows that at the time of the arrest of the petitioners the officers (approximately an hour and fifteen minutes to an hour and a half after the robbery in the Ballard District of Seattle) stopped their patrol car

by a stop sign at Northwest 87th Street and 15th Northwest in the Crown Hill District of Seattle, some 38 city blocks north and east from the scene of the robbery which was alleged to have occurred at 5811 24th Avenue Northwest in the Ballard District. At that time Officer Johnson observed a 1953 Ford station wagon, dark green with a white upper portion southbound on 15th Northwest. This car was therefore going towards the scene of the robbery and not away from it. The occupants of this car were not breaking any law whatsoever, and had a perfect right to be where they were.

Officer Johnson, who was driving the patrol car, turned directly behind petitioners' station wagon and went south on 15th behind it, observing two young men in the car. He stated that both young men, as far as age (the age of only one suspect was broadcast), and from what he could see, their general physical build matched the description given of the robbery suspects, and that also as he followed them south on 15th the passenger turned and noticed the police car, and it appeared to Officer Johnson that he called the attention of the driver to that fact and both men became obviously nervous, and the passenger apparently moved something on the floor. The police followed the petitioners' car south on 15th and made a right turn at the corner of 85th, followed them about a block and a half, *pulled them over to the curb and stopped them by turning on the emergency equipment, which consisted of the red domelight and two spotlights. They did not use the siren.*

The petitioners pulled to the curb as soon as the red light went on. They made no attempt to get away, and Officer Johnson did not feel that they were driving to

get away. At the time the petitioners were stopped, Officer Johnson testified that neither young man did anything other than both did turn, and look back through the interior of their car towards the prowler car as they pulled into the curb. Likewise, admitted that *he could not tell the height of the men as they sat in the car before they were stopped other than their general build* and, further, that when the passenger who turned out to be Robert, leaned forward, he could have been scratching his foot. *He had no idea of what he was doing.*

In this connection it is important in considering the sequence of events before the arrest was made by effecting a stoppage of the car and interruption of the movement of the petitioners. Officer Johnson testified the driver was wearing a sweater he believed, although he was not sure he could recall, and the passenger was wearing a T shirt. The officer further admitted that neither petitioner had on a jacket of any kind, that the officers could not see Levi's, and *that the clothing did not match the description from what he had seen, and was not a fact that made the officers suspicious at the time.*

He likewise admitted that the officers could not tell what the petitioners had on other than that the passenger wore a white undershirt.

We submit that the arrest and subsequent search of the petitioners, and the automobile in which they were riding, was in direct violation of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

At the time of their arrest, the petitioners were driving their automobile in a public street of Seattle as was their

perfect right under the Constitution and laws of this country. They were not violating any law of the State or any ordinance. The only reason upon which the State could attempt to justify its right to search the automobile, was as an incident to the arrest of the petitioners. The arrests, we submit, were unlawful, being upon mere suspicion and it would therefore naturally follow that the search of the car was unlawful.

The arrest of the petitioners in the case at bar having been illegal, the subsequent search was also illegal, and evidence so obtained should have been suppressed by the trial court. *Henry v. the United States,* 80, Supreme Court Reports 168; *Mapp v. Ohio,* 81 Sup. Ct. Rep. 1684, 367 U.S. 643 (1961).

This includes the so-called statements or admissions of the petitioner, John P. Kohler, which became inadmissible after the illegal arrest, as part of the fruits thereof. *Mapp v. Ohio,* 81 Sup. Ct. Rep. 1684, 367 U.S. 643 (1961); *Ker v. California,* 83 Sup. Ct. Rep. 1623, 374 U.S. 23 (1963).

No More Latitude Is Allowed in Arresting Without a Warrant Than in Securing One

In order to arrest for felony without a warrant, we submit that the information upon which the officer acts must have been sufficient to justify the issuance of a search warrant or a warrant of arrest, had the officers applied for one, and that no more latitude is allowed in arresting without a warrant than in securing one. Certainly, the fact that the petitioners were arrested in this case on *mere suspicion of robbery* with consideration by the officers of just a smattering of the information obtained only over the police radio, and no independent

knowledge on the part of the officers sufficient, up to the time of the arrest, to be probable cause constituting reasonable belief in the guilt of the petitioners, the information upon which they acted herein would not have been sufficient to justify the issuance of a warrant or a search warrant and, therefore, the arrest without warrant was illegal.

> "Evidence upon which an officer may base probable cause for search without a warrant must be sufficient to obtain a search warrant—and evidence which would be competent in the trial of the offence before a jury." *U.S. v. Novero*, 58 Fed. Supp. 275.

The United States Supreme Court in reversing the Texas case of *Aguilar v. Texas*, 84 Sup. Ct. 1509, 378 U.S. 108, 12 L.Ed.2d 723, 32 Law Week 4499, in 1964, on the ground that no probable cause was shown for the issuance of a search warrant involved in arrest of the defendant, observed that the warrant was obtained by two members of the Houston police force on the strength of an affidavit that they had "reliable information from a credible person and do believe that heroin—and other narcotics and narcotic paraphernalia are being kept at the above-described premises for the purpose of sale and used contrary to the provisions of the law." When the officers went to execute the warrant, they announced that they were police with a warrant and heard a commotion in the house. They forced their way in and seized the petitioner in the act of attempting to dispose of a packet of narcotics. At the trial, the petitioner objected unsuccessfully to the introduction of the evidence obtained, as a result of the execution of the warrant.

He was convicted and sentenced to 20 years for illegal

possession of narcotics and the Texas Court of Crminal Appeals affirmed.

Speaking through Mr. Justice Goldberg, the United States Supreme Court reversed and remanded. The court noted that *Ker v. California*, 83 Sup. Ct. Rep. 1623, 374 U.S. 23 (1963), had held that the "Fourth Amendment proscriptions are enforced against the States through the Fourteenth Amendment" and that "the standard of reasonableness is the same" under both Amendments.

The purpose of requiring a search warrant, the court went on, is to substitute the "informed and deliberate deliberations of magistrates" for "the hurried action of officers," in determining probable cause for the issuance. A reviewing court must insist that the magistrate perform his "neutral and detached" function and not serve merely as a rubber stamp for the police, the court said. The court further observed that the difficulty in that cause was that the affidavit *merely stated suspicion and belief without any statement of adequate supporting facts*:

> "The 'mere conclusion' that the petitioner possessed narcotics was not even that of the affiant, the court pointed out, but was that of an unidentified informant, and *there was no affirmative allegation that the affiant spoke with personal knowledge of the matters* contained therein. While an affidavit may be based on hearsay, the court added, the magistate must be informed of some of the underlying circumstances from which the informant reached his conclusions and some of the circumstances which led the officer to believe that the informant was 'credible,' or that his information was reliable."

Certainly, in the case at bar, as a result of only having information derived from the conflicting police radio broadcast, under the affirmative statements of the officer

on the stand during the pre-trial hearing, it was indicated beyond doubt that he and his partner acted with a fleeting idea or mere suspicion in stopping the car and without any personal supporting facts until the jackets and coins were discovered, at which time the officer erroneously claimed to have then made the arrest in this case, being satisfied *only after such discovery* beyond a mere suspicion.

The law requires that an officer have reasonable and probable cause to believe from facts sufficient to cause a reasonable belief that a defendant was guilty of the crime charged to justify arrest without a warrant on a felony charge. In other words, this is the question:

> "Was there probable cause for the officers to believe, or were the facts sufficient only to give rise merely to a suspicion?"

If the former, the arrest was legal and the evidence secured by it admissible. If the latter, the arrest was illegal, and the evidence obtained, not admissible.

We submit that there can be no question in the case at bar, but that the arrest was illegal and the evidence obtained not admissible, since on its face the record affirmatively shows under the state's evidence that the petitioners were not even arrested for a crime, but merely on suspicion of possible participation in a crime. We submit that no magistrate would be justified in issuing a warrant under the circumstances in this case, because probable cause must be shown before a warrant will issue. Under the facts established here, probable cause was not shown. *Rahm v. U.S.*, 4 F.2d 246; *Garske v. U.S.*, 1 F.2d 620, 625; *Emite v. U.S.*, 11 F.2d 623; *U.S. v. Clark*, 29 Fed. Supp. 138; *Henry v. the U.S.*, 80

Sup. Ct. Rep. 168; *Mapp v. Ohio*, 81 Sup. Ct. Rep. 1684, 367 U.S. Rep. 643; *Beck v. Ohio*, 85 Sup. Ct. Rep. 223, 379 U.S. 89; *Aguilar v. Texas*, 84 Sup. Ct. Rep. 1509, 378 U.S. 108; *Foley v. Connecticut*, 375 U.S. 85.

In criminal cases an illegal arrest or search cannot be legalized by the finding of evidence that a crime has been committed. A search or arrest that is illegal to begin with, remains illegal, and no injury will be allowed to flow to the defendant by reason of his submission and acquiescence to such search or arrest.

The Supreme Court of the United States, stated in *U. S. v. DiRe*, 68 Sup. Ct. 222, 322 U.S. 581:

> "We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."

See also *Byers v. U.S.*, 47 Sup. Ct. 248, 273 U.S. 28, 71 L.Ed. 520; *Henry v. U.S.*, 80 Sup. Ct. Rep. 168.

Inculpatory Statements of Petitioner John P. Kohler Were (1) Inadmissible under the Exclusionary Rule, and (2) Because of Insufficiency of Constitutional Warnings to Said Petitioners.

(1) The inculpatory statements of the petitioner, John P. Kohler, made to Officer Johnson and Detective Mullen, respectively, were stretched out of all proportion by the court to be admitted as admissions. The court even haltingly characterized the statements as admissions when he admitted them.

At any event, these so-called admissions were made after the petitioners were in custody under an illegal arrest, and as part and parcel of all of the evidence ob-

tained as the fruits thereof. As such, the statements were, we submit, inadmissible and should have been suppressed in accord with the petitioners' Motion to Suppress, under the Exclusionary Rule announced by the Supreme Court of the United States (under the Fourth and Fourteenth Amendments), in the case of *Mapp v. Ohio,* 81 Sup. Ct. Rep. 1686, 367 U.S. 643 (1961), in which the Supreme Court held that "all evidence obtained by searches and seizures in violation of the Federal Constitution is inadmissible in a criminal trial in a State Court." The United States Supreme Court likewise in *Ker v. California,* 83 Sup. Ct. Rep. 1623, 374 U.S. 23 (1963), held that the Fourth Amendment's proscriptions are enforced against the States through the Fourteenth Amendment.

Likewise, the statements made were in point of time very similar to out-of-court declarations, rather than admissions. Certainly, these statements standing alone would be insufficient for conviction under the current laws of the United States, in view of the Fourth and Fifth Amendments now being enforced against the States through the Fourteenth Amendment.

It is our understanding of the law as expressed by the Supreme Court of the United States in the case of *Wong Sun v. United States,* 83 Sup. Ct. Rep. 407, 371 U.S. 471, (1963), that the rule which regulates use of out-of-court statements is one of admissibility, rather than simply of weight of evidence, and must rest upon firmer ground than the uncorroborated admission or confession of the accused.

The court held further in the *Wong* case that verbal

evidence which derives immediately from unlawful entry, and unauthorized arrest, is no less the "fruit" of official illegality than mere common tangible fruits of unwarranted intrusion, and that the Fourth Amendment may protect against overhearing of verbal statements, as well as against more traditional seizure of papers and effects. It was likewise held by the court that where a crime involves no tangible *corpus delecti,* evidence corroborative of a confession must implicate the accused in order to show that the crime has been committed.

Mr. Justice Brennan speaking for the court at Page 416, said:

> "The Exclusionary Rule has traditionally barred from trial, physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in *Silverman v. United States,* 365, U.S. 505, 81 Supreme Court 679, 5 Law Ed.2d 734, that the Fourth Amendment may protect against the overhearing of verbal statements, as well as against the more traditional seizure of "papers and effects." Similarly, testimony has been excluded in order to enforce the basic Constitutional policies. *McGinnis v. United States;* (1 Cir.) 227 Fed. 2d, 598. Thus, verbal evidence that derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of unwarranted intrusion."

We submit that the inculpatory statements characterized as admissions in this case of the petitioner, John P. Kohler to Officer Johnson and Detective Mullen should have been excluded under the Exclusionary Rule as "fruits" of the illegal arrest of the defendants below.

(2) Constitutional rights brought to the attention of the petitioners by officer Johnson under the record were

limited to the following: 1. His right to remain silent and to make no statement. 2. That he should contact an attorney.

Detective E. T. Mullen, at the Wallingford Precinct, advised petitioner John Kohler only of the following rights: 1. That he did not have to say anything. 2. That he had a right to see an attorney before saying anything. 3. That anything he did say could be used in a Court of Law.

There is no evidence whatsoever in the record, nor does the departmental opinion assert that petitioner John Kohler at any time waived his constitutional rights.

Under the record in this case the petitioners were *not completely advised of their rights,* and the departmental ruling goes directly counter to *Miranda v. Arizona,* 86 Sup. Ct. 1602, 384 U.S. 436, 16 L.Ed.2d 694; and *United States ex rel. Russo v. New Jersey,* 351 F.2d 429. See also *Mapp v. Ohio,* 367 U.S. 643, 685; and *Escobedo v. Illinois,* 84 Sup. Ct. 1758, 378 U.S. 478. *The requirements of Miranda are as follows:*

1. At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has a right to remain silent.

2. The warning of the right to remain silent must be accompanied by the explanation that anything said can be and will be used against the individual in court.

3. That an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and *to have the lawyer with him during the*

interrogation under the system for protecting the privilege delineated by the court. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, *this warning is an absolute prerequisite to interrogation.*

4. In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has a right to counsel with an attorney, *but also that if he is indigent a lawyer will be appointed to represent him.* Without this additional warning, the admonition of the right to consult with counsel will often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one.

Part of the inculpatory statements made by the petitioner, John Kohler, were made while in custody under interrogation by the officer who had omitted warning him that he was entitled to have a lawyer with him during interrogation and, likewise, that he was entitled to a lawyer appointed to represent him if he was indigent, both of which warnings under *Miranda* were absolute prerequisites to interrogation.

The Inculpatory Statements of the Petitioner, John P. Kohler, as So-Called Voluntary Admissions Under the Washington Statute on Confessions Should Have Been Held Inadmissible Not Having Been Freely Determined.

Revised Code of Washington 10.58.030 *on Confessions Is Unconstitutional, Being in Violation of the Fifth Amendment of the United States and Inconsistent with the Fourteenth Federal Amendment Due Process Clause.*

Under the Revised Code of the State of Washington, cited as R.C.W. 10.58.030, it is provided:

"The confession of a defendant made under inducement, with all the circumstances may be given as evidence against him, except when made under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony."

While the test of voluntariness appears, by the weight of authority in the State of Washington to have been the basis for determining its admissibility, and a confession or admission would be considered admissible when not produced by threats, we submit that under this statute a confession obtained by trickery or inducement of hope which would be admissible, although not sufficient to warrant conviction without corroborating testimony, violates the self incrimination provision of the Fifth Amendment of the United States, just as much as does a confession or admission obtained by force or threat of force.

Likewise, we submit that the Washington Statute above quoted is also inconsistent with the Fourteenth Federal Amendment Due Process Clause, which allows the State Court to admit a confession into evidence only if it has been "freely determined." *Rogers v. Richmond,* 81 Sup. Ct. Rep. 735, 365 U.S. 534, 544 (1961).

The trial court in the case at bar in ruling on the admissibility of admissions in his findings drew the following conclusions:

"1. The admissions and confessions of John P. Kohler were given voluntarily and of the defendant's own free will and volition, without the use of force, threats of violence, without any promise or inducement of any kind, or any questions that were not true, nor were any misleading questions asked by said officer,

"2. That the admissions or confessions of John P. Kohler were admissible."

This ruling was in accord with the Washington statute, R.C.W. 10.58.030. However, in the Federal case of *United States ex rel. Russo v. New Jersey*, 351 F.2d 429 (Cir. 1965), the court held that answers to questions put in the absence of counsel to a person arrested but not yet indicted cannot be admitted in evidence, although the suspect does not request counsel and *his statements are voluntary*, if the court finds that the investigation has focused on him and he has not specifically waived the right to counsel.

Certainly, upon the facts developed on the Motion to Suppress during the pre-trial hearing in the case at bar, the inculpatory statement of the petitioner, John P. Kohler, to Officer Johnson, and his inculpatory statement during the conversation with Detective Mullen, all made within one hour after his arrest while held at Wallingford Precinct, before an information had been filed against him, and while the investigation "focused" on him, he not having counsel nor having specifically waived the right to counsel, all fall directly under the ruling in the *Russo* case *supra* (351 F.2d 429), decided by the Third Circuit in 1965. See also *Miranda v. Arizona*, 86 Sup. Ct. Rep. 1602, 16 L.Ed.2d 694 (June 14, 1966).

We submit that John Kohler's erroneously termed "Admissions," therefore, were inadmissible even though voluntary, under the facts at bar, in view of the Self Incrimination Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment, the test of voluntariness of said admissions under the Washington Statute R.C.W. 10.58.030, quoted *supra* at length, being,

we submit, unconstitutional and in violation of the above Amendments to the Constitution of the United States.

We respectfully observe that the State Courts often lose sight of the fact that the Fourteenth Amendment condemns all State action, denying due process of law, regardless of whatever department of the Government is involved.

The precise language of the self incrimination clause of the Fifth Amendment is now held to be applicable as well to the states under the due process clause of the Fourteenth Amendment, and applies to both Federal and State trials. *Mallory v. Hogan*, 84 Sup. Ct. Rep. 1489, 378 U.S. 1 (1964); *Murphy v. Waterfront Commission*, 84 Sup. Ct. Rep. 1594, 378 U.S. 52 (1964).

Because the evidence was not suppressed in the case at bar in accord with the petitioners' timely Motion, and the timely hearing thereupon before the trial, this case could only have been decided by the jury upon the basis of inadmissible evidence.

We submit that the arrest, search and seizure involved in this case so far as the petitioners were concerned was in direct violation of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States, and that furthermore, the admission of the inculpatory statements and/or admissions of the petitioner, John P. Kohler, were in direct violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, having been admitted under an Unconstitutional Statute of the State of Washington, namely R.C.W. 10.-58.030.

The evidence obtained under such illegal arrest, search

and seizure compromising all articles taken from the a
tomobile, including the jackets, rolls of nickels and gu
together with any statements of the officers in referen
thereto, as well as the inculpatory statements and/or a
missions of the petitioner, John P. Kohler, should ha
been suppressed upon the Motion to Suppress of t
petitioners, which was timely made.

CONCLUSION

For the foregoing reasons, this Petition for Writ
Certiorari should be granted.

Respectfully submitted,

B. GRAY WARNER
CLARENCE W. PIERCE
MICHAEL R. ALFIERI
Counsel for Petitione

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THE COUNTY OF KING

No. 43297

THE STATE OF WASHINGTON,
Plaintiff,
vs.
JOHN P. KOHLER,
Defendant.

Judgment and Sentence

The Prosecuting Attorney with the defendant John P. Kohler and counsel H. Opendack came into Court. The defendant was duly informed by the Court of the nature of the information against him for crime of robbery committed on or about the 4th day of October, 1965, of his arraignment and plea of "Not guilty of the offense charged in the information," of his trial and the verdict of the jury on the 7th day of December, 1965, "guilty as charged."

The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied he had none.

And no sufficient cause being shown or appearing to the Court, the Court renders its judgment: That whereas the said defendant having been duly convicted in this Court of the crime of Robbery it is therefore Ordered, Adjudged and Decreed that the said defendant is guilty of the crime of Robbery and that he be sentenced to imprisonment in such penal institution or correctional facility, under the jurisdiction and supervision of the Department of Institutions, as the Director of Institutions

shall deem appropriate pursuant to the provisions
RCW 72.13.120, for a maximum term of not more tha
Twenty (20) years, and a munimum term to be fixe
by the Board of Prisons Term and Paroles.

The defendant is hereby remanded to the custody
the Sheriff of King County to be by him detained unt
called for by the transportation officers of the Depar
ment of Institutions authorized to conduct him to th
Washington Corrections Center.

Done in open court this 4th day of January, 1966.

GEORGE H. FREESE, *Judg*

Presented by:

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THE COUNTY OF KING

No. 43297

THE STATE OF WASHINGTON,
Plaintiff,
vs.
ROBERT C. KOHLER,
Defendant.

Judgment and Sentence

The Prosecuting Attorney with the defendant Robert C. Kohler and counsel Henry Opendack came into Court. The defendant was duly informed by the Court of the nature of the information found against him for the crime of Robbery committed on or about the 4th day of October, 1965, of his arraignment and plea of "Not guilty of the offense charged in the information," of his trial and the verdict of the jury on the 7th day of December, 1965, "guilty as charged."

The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied he had none.

And no sufficient cause being shown or appearing to the Court, the Court renders its judgment: That whereas the said defendant having been duly convicted in the Court of the crime of Robbery it is therefore Ordered, Adjudged and Decreed that the said defendant is guilty of the crime of Robbery and that he be sentenced to imprisonment in such penal institution or correctional facility, under the jurisdiction and supervision of the Department of Institutions, as the Director of Institutions

shall deem appropriate pursuant to the provisions of RCW 72.13.120, for a maximum term of not more than Twenty (20) years, and a minimum term to be fixed by the Board of Prisons Term and Paroles.

The defendant is hereby remanded to the custody of the Sheriff of King County to be by him detained until called for by the transportation officers of the Department of Institutions authorized to conduct him to the Washington Corrections Center.

Done in open court this 4th day of January, 1966.

GEORGE H. FREESE, *Judge*

Presented by:

APPENDIX C

OPINION OF THE SUPREME COURT OF THE STATE OF WASHINGTON

[No. 38697. Department Two. March 2, 1967.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN P. KOHLER *et al.*, *Appellants.**

LANGENBACH, J.[1]—The defendants were convicted of having robbed a tavern on 24th N.W. in the Ballard District of Seattle. The primary issue is whether the police officers who arrested them without warrants had probable cause to believe that the defendants had committed that felony. Defendants argued that they were arrested on suspicion only and moved to suppress all evidence obtained as a result of the arrest. The denial of that motion, resulting in the introduction of the challenged evidence at trial, is the gravamen of the defendants' appeal from the robbery conviction. (Counsel on appeal were not the defense counsel at trial.)

The robbery occurred at 11 p.m., October 4, 1965. Within 2½ hours all of the events with which this appeal is concerned had transpired.

The tavern's owner, Beane, testified at the pretrial hearing that he was held up by two white males whose faces were covered by stocking masks. Within minutes he gave what description he could to the police. The "shorter" of the two white males was 5 feet 6 to 5 feet 8 inches in height; he stayed by the door of the tavern during the robbery. The "taller" of the two men was between 6 feet and 6 feet 2 inches in height; he carried

1. Judge Langenbach is serving as a judge pro tempore of the Supreme Court pursuant to Art. 4, §2(a) (amendment 38), state constitution.

a .22 caliber rifle; came all the way into the tavern and took the money. The taller man wore a dark zippered jacket while the shorter man had on a light jacket; the taller man wore a pair of dark, levi-type pants while the shorter wore lighter pants similar to his jacket.

Larry King was a railway switchman riding to work on a bus that night. He was sitting opposite the bus driver on the long seat which ran parallel with the length of the bus. He was turned forward from the waist looking out the front window of the bus as it proceeded south on 24th N.W. As the bus neared the tavern, King saw two men on the street, some 10 to 20 feet south of the tavern door. They were running south. When they were half way to the street corner the bus was almost even with them. About 20 feet from the corner, the shorter, stockier of the two men cut through the hedge. He carried some object in his hand. The taller man ran on to the corner and turned west stopping at the driver's side of a car parked about 15 to 20 feet off 24th N.W. As the taller man opened the door the dome light came on revealing a rifle held in his left hand. He climbed into the car. By this time the bus was three-quarters of the way through the intersection and King was standing up in the aisle looking toward the rear. Because the bus moved out of range he did not see the car drive away. King told the bus driver that it looked like a robbery and should be reported. Within 15 minutes he was giving the police a statement.

King told the police that the taller man was around 6 feet tall and the other was shorter and stockier. The taller man, slimmer in build, wore an even colored combination of clothing darker in color than that worn by

the shorter man. The shorter man wore a lighter pair of trousers and a fairly tan or dark jacket. He described the jackets as parka-type, short, not long to the knees. He could not say whether the jackets were zippered. He gave the police the following description of the car: It was a 1953 or 1954 Ford station wagon, lighter colored on the top and a darker color on the bottom. He told the officers that the tall man with the rifle got in on the driver's side and the shorter man got in on the passenger's side of the car. He had no idea of the men's ages and was unable to recognize the defendants in a police "lineup."

The foregoing testimony has no bearing upon the arrest and search. It is related merely to establish the sequence of events and the information which resulted in the police radio broadcast. The arresting officers acted solely upon the information relayed to them over the radio together with their own observations.

The arresting officers were Johnson and Fisher. Fisher was ill at the time of hearing and could not appear to testify. The following is based upon the testimony of Officer Johnson. The defendants did not testify at the hearing on their motion to suppress, nor at the trial which resulted in their conviction.

Around midnight on October 4, 1965, Johnson and his partner were on a routine patrol in the north end of Seattle. Johnson heard a police radio broadcast reciting that an armed robbery of a tavern had taken place in the Ballard district. The description was given of two white males: Number one was 20 to 25 years old, 5 feet 8 inches tall, approximately 150 pounds, medium build. He was wearing light blue levi pants and a white or

pale beige zippered nylon jacket. Number two was a white male, slightly taller, approximately 5 feet 11 inches, 140 pounds, slender build, wearing light levi pants and a darker tan zippered nylon jacket. The men were alleged to have left the area in a dark, possibly dark green or blue and white two tone, dark body with lighter top, Ford station wagon, approximately a 1953 model. The broadcasts stated that the men were armed with a rifle and that some currency and rolled nickels had been taken in the robbery.

At about 12:30 a.m., October 5, 1965, Johnson and Fisher were stopped near a stop sign at 87th and 15th N.W. Johnson observed two white males southbound on 15th in a 1953 two-tone Ford station wagon, dark green with a white upper portion. The officers felt that the two young men matched in age and general build the description broadcast. However, one of the men was wearing a white "T" shirt and the other a light sweater. The officers could not tell their respective heights and weights or what kind of pants they were wearing.

The police car turned directly behind the suspect vehicle and followed it south on 15th for about a block and a half before pulling it over. While the officers were following the car and observing its occupants, the passenger turned and appeared to notice the police car following. He appeared to say something to the driver and at that point both men appeared to the police to become obviously nervous. They sat looking straight ahead, looking neither to the right nor to the left. Johnson said that he was struck by the change in their demeanor. He also stated that it appeared to the following officers that the passenger leaned forward and shoved something under

he front seat. The police turned on their red dome light. ohnson stated that because they felt these were the rob- ery suspects and possibly armed, they also shined two potlights into the interior of the car. The car immediately ulled over.

After the cars had stopped, Officer Fisher went to the assenger side of the car and the passenger (Robert Koh- er) dismounted. Officer Johnson went to the rear of the ehicle and motioned the driver (John Kohler) to dis- nount on the passenger side. As Johnson stood talking o defendants he looked into the interior of the car and aw on the seat behind the front seat two nylon jackets vhich matched the description broadcast over the police adio. The passenger door to the car was open and Officer Fisher shined his light on the floorboards revealing to he officers several rolls of rolled coins. At this point Fisher and Johnson indicated to each other their agree- nent that these were the robbery suspects, and defend- nts were placed under arrest. They were told that they vere under arrest on suspicion of robbery. Their persons vere searched and they were handcuffed.

The defendants were taken to a precinct station in eparate cars. At the station Johnson advised John Kohler of his right to remain silent, his right to refrain from naking a statement, and that he should call an attorney. ohn Kohler replied that he was aware of his rights and hat he had nothing to say. He did not then attempt to all an attorney. The time was approximately 1:10 a.m., October 5, 1965, when John Kohler went to the men's oom accompanied by Officer Johnson. While relieving imself, John Kohler told Officer Johnson that he would ike to make a deal to get his kid brother off. Johnson

replied that there could be no deal. At that time John Kohler asked to call an attorney. He was returned to the station's work room, given a Seattle telephone directory and told how to get an outside line. He opened the telephone directory to that section of the yellow pages dealing with attorneys. He called six times but received no answer. After the sixth call he said that he could call again from the jail. He said he would call his wife in the morning.

Detective Mullen testified that about 1:30 a.m., he talked to both defendants. Robert, the younger, had nothing to say. Mullen then identified himself to John Kohler and told him that he did not have to say anything, that he had a right to see an attorney before he said anything, and that anything he said could be used in a court of law. John asked why they were arrested. Mullen told him they had been arrested as suspects in the robbery of a tavern. John Kohler then asked Mullen if the robbers had been masked. Asked why he wanted to know, John replied that if their heads had been covered they could not be identified. At that time, Mullen testified, John Kohler demanded the use of a telephone to call an attorney. He made six separate calls which Mullen assumed were attempts to get an attorney. It is not clear from the record whether Mullen and Johnson were testifying to the same six calls or whether John Kohler tried on two occasions to contact an attorney.

The defendants did not offer any testimony but stood upon their motion to suppress the evidence. After the hearing that motion was denied. The defendants offered no proof at trial and were convicted by the jury. They have appealed.

[1] There were seven assignments of error, argued together. They pertain to the trial court's failure to sustain defendants' motion to suppress all articles taken from the automobile including the jackets, rolls of nickels and gun, together with any statements of the officers in reference thereto, as well as the inculpatory statements of the defendant John Kohler.

> If an officer believes *and* has good reason to believe, that a person has committed, or is about to commit a felony, he may arrest without a warrant. This is but another way of saying that an officer must have probable cause to believe that a felony has been or is about to be committed and that the person arrested committed or is about to commit it. [Citing cases.] . . . Even a strong belief held in good faith if unsupported by the circumstances will be insufficient to make a search valid. [Citing case.] The probable cause essential to support an arrest without a warrant is a belief based upon facts within the knowledge of the arresting officer, persuasive enough to convince a judge that a cautious but disinterested man would also believe the arrested person guilty. [Citing cases.]
>
> If the arrest was lawful, *i.e.*, upon probable cause, then a search of the person, the immediate area and the nearby automobile became lawful. [Citing cases.] Such a search incident to a lawful arrest is permitted to protect the arresting officer from assault by accomplices or hidden weapons and to prevent the destruction of evidence. [Citing case.] *State v. Darst*, 65 Wn. 2d 808, 811, 399 P.2d 618 (1965).

[2] Were the facts within the officers' knowledge and the circumstances under which the officers confronted the defendants sufficient in themselves to warrant in a cautious but disinterested man the belief that John and Robert Kohler had robbed the tavern? There are three elements in this question. (1) The belief of the officers, (2) the requirement that the belief be reasonably grounded, and (3) the coexistence of the first two elements

at "the moment the arrest was made."[2]

A careful review of the record can result in no conclusion other than when the officers placed the Kohler brothers under arrest, the officers both believed them to be tavern robbers and had good reason for that belief. The officers knew that two white young males had robbed the tavern and made their getaway in a two-tone (dark blue or green bottom; light upper portion) Ford station wagon of approximately 1953 vintage. Less than an hour after receiving that information there drove past these officers two white young males in a 1953 two-tone (dark green bottom; light upper portion) Ford station wagon. That car was defendants' Achilles' heel; the improbability of two such cars carrying four such occupants at that time of night in this section of Seattle is manifest. When Officer Johnson was asked why he stopped the Kohler automobile he replied:

> The fact that the car matched the description and the occupants of the car matched the general description; the actions of the passenger upon noting the police car, and just their general demeanor after having noted the police car was behind them. These things all combined, and we felt we should stop them.

Because there was reasonable cause to arrest appellants, the motion to suppress the evidence obtained by the arrest was properly denied. Appellants had been distinctly advised of their constitutional rights upon arrest. Consequently there was no error in the admission of the statements of John Kohler. The judgment and sentence is affirmed.

FINLEY, C. J., DONWORTH, ROSELLINI, and HAMILTON, JJ., concur.

2. *Beck v. Ohio*, 379 U.S. 89, 91, 13 L.Ed.2d 142, 85 Sup. Ct. 223 (1964).

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,
v.
JOHN P. KOHLER and
ROBERT C. KOHLER,
Appellants.

REMITTITUR
No. 38697
King County No. 43297

The State of Washington to: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on March 2, 1967, became the final judgment of this court in the above entitled case on May 22, 1967. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

One Hundred Seventy-five and 05/100 ($175.05) Dollars in favor of respondent and against appellants.

The Petition for Rehearing was Denied by an Order filed May 22, 1967.

cc: Court Reporter
Mr. E. Paul Schumann
Mr. B. Gray Warner
Hon. Charles O. Carroll
Mr. Herbert L. Onstad

IN TESTIMONY WHEREOF, I have hereunto set m
hand and affixed the seal of said Court at Olympia, th
22nd day of May, A. D. 1967.

WILLIAM M. LOWRY, Clerk of the Supreme Cour
State of Washington.

APPENDIX E

The Fourth Amendment of the Constitution of the United States provides:

> "*Security from Unwarranted Search and Seizure.* The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment of the Constitution of the United States reads as follows:

> "*Rights of Accused in Criminal Proceedings.* No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment of the Constitution of the United States, provides:

> "§1. CITIZENSHIP RIGHTS NOT TO BE ABRIDGED BY STATES. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*"